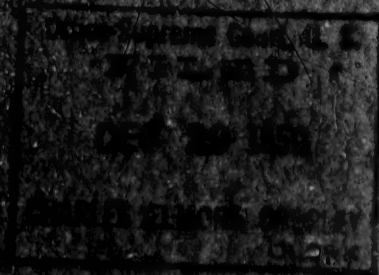


LIBRARY
SUPREME COURT U.S.



INDEX

Opinions below	Page
Jurisdiction	1
Question presented	2
Statute and regulations involved	2
Statement	2
Reasons for granting the writ	6
Conclusion	10
Appendix	11

CITATIONS

Cases:

<i>Hilton v. Sullivan</i> , 334 U. S. 323	9
<i>Keith v. United States</i> , 177 U. S. 290	7
<i>Love v. United States</i> , 108 F. 2d 43, certiorari denied, 309 U. S. 673	7
<i>Mitchell v. Cohen</i> , 333 U. S. 411	7

Statute:

Veterans Preference Act of 1944, Act of June 27, 1944, c. 287, 58 Stat. 387 (as amended July 26, 1947, c. 343, 61 Stat. 501; January 19, 1948, c. 1, 62 Stat. 3; July 2, 1948, c. 816, 62 Stat. 1233; August 26, 1949, c. 513, 63 Stat. 666; 5 U. S. C. Supp. III, 851, 856, 857, 858, 860, 861, 864)	2
Sec. 2	5, 6, 10, 11
Sec. 7	8, 12
Sec. 8	8, 13
Sec. 9	14
Sec. 11	8, 14
Sec. 12	5, 6, 8, 9, 14
Sec. 14	3
Sec. 15	6, 8, 9, 15

Miscellaneous:

Civil Service Regulations, 5 CFR (1949):

Part 2:	
Sec. 2.107	9, 16
Part 20:	
Sec. 20.1	6, 9
Sec. 20.3	3, 18
Sec. 20.8	20

Miscellaneous—Continued

Civil Service Regulations, 5 CFR (1949)—Continued

Part 21:

	Page
Sec. 21.1.....	21
Sec. 21.2.....	22
Sec. 21.3.....	22
Sec. 21.5.....	9, 23
Sec. 21.6.....	9, 24
Sec. 21.7.....	9, 26
90 Cong. Rec. 3503.....	7
9 F. R. 9575.....	9
9 F. R. 13699.....	9
10 F. R. 3003.....	9
12 F. R. 2832.....	9
12 F. R. 2849.....	6
12 F. R. 2850.....	3
Hearings before the Senate Committee on Civil Service on	
H. R. 4115, 78th Cong., 2d sess., p. 9.....	7
H. Rep. No. 1289, 78th Cong., 2d sess., p. 3.....	7
Sen. Rep. No. 907, 78th Cong., 2d sess., p. 2.....	7

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 473

CHARLES F. BRANNAN, SECRETARY, DEPARTMENT OF
AGRICULTURE, PETITIONER

v.

ROBERT D. ELDER AND GREENE CHANDLER FURMAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA CIRCUIT

The Solicitor General, on behalf of Charles F. Brannan, individually and as Secretary of Agriculture, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case¹ on June 15, 1950.

OPINIONS BELOW

The memorandum opinion of the district court (R. 72) is not reported. The opinion of the

¹ The cases were consolidated for hearing in the district court (R. 84) and were briefed and argued together before the court of appeals (R. 88).

Court of Appeals for the District of Columbia (R. 88) is reported at 184 F. 2d 219.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 1950 (R. 96). A petition for rehearing, filed on June 30, 1950 (R. 97), was denied on October 2, 1950 (R. 100). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether under the Veterans Preference Act of 1944 the reemployment rights of veterans properly separated from their positions in federal service are governed by the reduction-in-force regulations under Section 12 of the Act, rather than by Section 15 which deals specifically with preference in reemployment.

STATUTE AND REGULATIONS INVOLVED

Pertinent portions of the Veterans Preference Act of 1944 (58 Stat. 387, 5 U. S. C. Supp. III § 851 *et seq.*) and of the Regulations of the Civil Service Commission are set forth in the Appendix (*infra*, pp. 11-27).

STATEMENT

These actions were brought by respondents, honorably discharged veterans entitled to the benefits of the Veterans Preference Act of 1944, 58 Stat. 387 (Appendix, *infra*, pp. 11-16) (R. 3,

77), for mandatory injunctions to restrain their separation from the Department of Agriculture and for declaratory judgments (R. 2-7, 76-82). Amended and supplemental complaints alleged the violation of respondents' rights in the retention and reemployment of other employees (R. 52-53).

In July and August of 1943, respondents entered federal service in the positions of associate attorneys (Grade P-3) in the Office of the Solicitor of the Department of Agriculture (R. 3, 77). Their appointments were limited to the duration of the war and six months thereafter, and they did not acquire classified civil-service status (R. 72, 90). On May 29, 1947, together with eighteen other attorneys, they were notified that, pursuant to a reduction in force necessitated by a shortage of funds, they would be separated from the service effective June 30, 1947 (R. 8, 70, 71). The separation was effected in due course (R. 60).

Respondents appealed their separation to the Civil Service Commission under Section 14 of the Veterans Preference Act of 1944 (R. 33). The Commission found that the action had been taken in conformity with its reduction-in-force regulations and denied the appeals (R. 34, 63).² On

² The Civil Service Commission "Retention Preference Regulation for use in Reductions in Force," 12 F. R. 2850, 5 CFR (1949) § 20.3 provide: "For the purpose of determining relative retention preference in reductions in force, em-

June 5, 1947, while the appeals to the Commission were pending, respondents instituted these actions.

Some time subsequent to separation of respondents, additional funds became available to the Department of Agriculture and were allotted to the Office of the Solicitor, and several attorneys who had not been reached for separation resigned (R. 71). Neither of those events could have been foreseen at the time of respondents' separation (R. 72). Thereupon, the Solicitor reemployed nine attorneys, including one veteran, the first of whom took office on October 27, 1947, five months after respondents' notice of separation (R. 72). Several of the attorneys rehired had been separated at the same time as respondents but with

ployees shall be classified according to tenure of employment in competitive retention groups and subgroups as follows:

* * * * *

Group B. All employees serving in positions in the competitive service without competitive status or serving under appointments limited to the duration of the present war or for the duration of the war and not to exceed six months thereafter, or otherwise limited in time to a period in excess of one year, except those specifically covered in Groups A and C.

B-1 With veteran preference unless efficiency rating is less than 'Good'.

B-2 Without veteran preference unless efficiency rating is less than 'Good'.

* * * * *

Respondents, as war-service appointees with veteran preference and efficiency ratings of good or better were properly classified in subgroup B-1.

inferior positions on the retention register (R. 52). The nine attorneys were selected on the basis of training and experience and their particular suitability for the positions they were to fill (R. 72).

The district court found that respondents had been separated "in full compliance with the applicable statutes and regulations" and granted petitioner's motion for summary judgment (R. 72). The district court apparently did not consider any question of discrimination in reemployment. Similarly, on appeal, the only issues presented related to the validity of respondents' separation and not to discrimination in reemployment. The court of appeals agreed with the lower court and the Civil Service Commission that the separation had been proper, but it reversed the decision below on the ground that Section 2 and the reduction-in-force regulations under Section 12 of the Veterans Preference Act of 1944 created reemployment rights which "were violated * * * when other attorneys, classified in a lower subgroup than B-1, who had been released with [them], were reemployed" (R. 93). Since the district court granted a motion for summary judgment, the cases were remanded for determination of the single issue of discrimination in reemployment (R. 95).

The Government filed a petition for a rehearing (R. 97) on the grounds that the issue of reemployment had not been argued by the parties

and that the scope of reemployment preference was prescribed in Section 15 of the Act, which had not been briefed by the parties or discussed by the Court, and not by Section 2 or Section 12. The petition requested the court, in the event rehearing was not desired, to modify its opinion to direct the district court to hear the question of compliance with the statutory provisions and regulations dealing with reemployment preferences (R. 99). The petition for rehearing was denied (R. 100).

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because it interprets erroneously the Veterans' Preference Act of 1944 in a manner which has a very serious impact on the Federal Government's personnel policies and practices. ♦

1. Relying upon the general language of Section 2 of the Act (*infra*, p. 11) to the effect that "preference shall be given" honorably discharged veterans "in certification for appointment, in appointment, in reinstatement, in reemployment, and in retention," the court below applied the standards of the Civil Service Commission's *reduction-in-force* regulations under Section 12 (*infra*, p. 15)* as the measure of veterans' *reemployment* rights. In reaching its decision, the court completely ignored Section 15 of the Act (*infra*, p. 16) where Congress carefully

* 12 F. R. 2849, 5 CFR (1949) § 20.1 *et seq.*

delimited the scope of the veteran's reemployment rights. The effect of the holding is to substitute for the statutory measure of veterans' reemployment rights the completely different standards established by statute and regulation with respect to retention in employment.

The result reached by the court below is in clear violation of the statutory purpose. The structure of the statute makes unmistakably plain its purpose, first, to describe the persons entitled to its benefits and, then, to define those benefits. Thus, Section 2 (*infra*, p. 11), which the court below apparently assumed conferred specific rights, does no more than enumerate the classes of persons who shall be entitled to various employment preferences. See *Mitchell v. Cohen*, 333 U. S. 411; cf. *Keim v. United States*, 177 U. S. 290; *Love v. United States*, 108 F. 2d 43 (C. A. 8), certiorari denied, 309 U. S. 673. The legislative history of the Act establishes beyond question that Section 2 was regarded as simply "defining the various groups to whom preference [was] to be granted." H. Rep. No. 1289, 78th Cong., 2d sess., p. 3; Sen. Rep. No. 907, 78th Cong., 2d sess., p. 2. This intention was announced by Representative Starnes, author of the bill, in explaining the bill in the House (90 Cong. Rec. 3503, 78th Cong., 2d sess.) and during the Senate Hearings on the bill. Hearings before the Senate Committee on Civil Service on H. R. 4115, 78th Cong., 2d sess., p. 9.

The later sections define the substance of the "preference" conferred with respect to appointment, reemployment, reinstatement and retention. Under the statutory scheme, Sections 7 (*infra*, p. 12) and 8 (*infra*, p. 13) prescribe the preference to be accorded a veteran in certification for appointment, Section 12 (*infra*, p. 15) in retention, and Section 15 (*infra*, p. 16) in reemployment and reinstatement after separation without fault. It is therefore an obvious error to apply to the reemployment rights under Section 15 the retention standards promulgated under Section 12.

Section 15 deals specifically and exclusively with the reemployment preference to be accorded a veteran who, like respondents, has been separated from the service without misconduct or delinquency on his part.⁴ Upon request, he may have his name placed on all registers and employment lists for positions for which he is qualified. His rank on the register or list is to be in accordance with a rating augmented because of his veteran's status and his name is to be placed ahead of all non-veterans with the same rating. Thereafter, when reached for appointment, his name is submitted to the appointing officer with the two next highest ranking on the list. The appointing officer must select one of the three, but need not choose the veteran provided he can justify his choice. Where a reemployment list

⁴ The provisions of Sections 7 and 8 dealing with original appointments are incorporated by reference in Section 15.

for a position contains the names of three or more preference eligibles, no appointment, except of a ten-point preference eligible, may be made from an examination roster. Pursuant to statutory authority (Sec. 11, 5 U. S. C. 860), the Civil Service Commission has promulgated regulations to implement the reemployment provisions of Section 15. 10 F. R. 3003, 5 C. F. R. (1949) 21.5-21.7; 12 F. R. 2832, 5 C. F. R. (1949) 2.107.

Section 12, on the other hand, relates only to personnel reductions and the Commission's reduction-in-force regulations, issued specifically under the authority of Section 12, deal exclusively with retention preferences. 9 F. R. 9575; 9 F. R. 13699; 5 C. F. R. (1949) 20.1 *et seq.* See *Hilton v. Sullivan*, 334 U. S. 323. The system of preferences for discharges established by the statute and implemented by the regulations bears no resemblance whatever to that established for reemployment. There is no basis in the statute, the regulations, or in reason for substituting the preferences created in the one employment area for those established in the other. Had the court below tested the respondents' reemployment rights against the statutory standards for reemployment it would necessarily have reached an opposite result. For there has been no finding, or even an allegation, that the provisions of Section 15 were not followed in these cases.

2. The decision below, in using reduction-in-force regulations as a yardstick for reemploy-

ment, casts doubt upon the validity of countless personnel actions taken in the past in reliance upon the explicit statutory provisions and regulations relating to reemployment, and raises serious doubts as to the course to be followed in the future. It establishes a judicial system of preference regulation not sanctioned by statute. Moreover, in holding that Section 2, without more, confers preference benefits, the decision may create boundless confusion in the entire field of veterans' preference in the federal service. If the definition of the scope of preferences is not to be found in the specific sections of the act dealing with particular aspects of employment, neither the Civil Service Commission, the employing agency, nor the veteran himself has any reliable guide to the meaning of "preference" in a particular situation. The end product of such uncertainty must be a proliferation of suits alleging violations of supposed rights under Section 2 in certification, appointment, reinstatement, reemployment, and retention.

CONCLUSION

For the reasons stated it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

DECEMBER, 1950.

APPENDIX

A. STATUTE

The pertinent portions Sections 2, 7, 8, 9, 11, 12, and 15 of the Veterans' Preference Act of 1944, Act of June 27, 1944, c. 287, 58 Stat. 387 (as amended July 26, 1947, c. 343, 61 Stat. 501; January 19, 1948, c. 1, 62 Stat. 3; July 2, 1948, c. 816, 62 Stat. 1233; August 26, 1949, c. 513, 63 Stat. 666; 5 U. S. C. Supp. III, 851, 856, 857, 858, 860, 861, 864), provide:

SEC. 2. In certification for appointment, in appointment, in reinstatement, in reemployment, and in retention in civilian positions in all establishments, agencies, bureaus, administrations, projects, and departments of the Government, permanent or temporary, and in either (a) the classified civil service; (b) the unclassified civil service; (c) any temporary or emergency establishment, agency, bureau, administration, project, and department created by Acts of Congress or Presidential Executive order; and (d) the civil service of the District of Columbia, preference shall be given to (1) those ex-service men and women who have served on active duty in any branch of the armed forces of the United States and have been separated therefrom under honorable conditions and who have established the present existence of a service-connected

disability or who are receiving compensation, disability retirement benefits, or pension by reason of public laws administered by the Veterans' Administration, the Department of the Army or the Navy Department; (2) the wives of such service-connected disabled ex-servicemen as have themselves been unable to qualify for any civil-service appointment; (3) the unmarried widows of deceased ex-servicemen who served on active duty in any branch of the armed forces of the United States during any war, or in any campaign or expedition (for which a campaign badge has been authorized), and who were separated therefrom under honorable conditions; and (4) those ex-servicemen and women who have served on active duty in any branch of the armed forces of the United States, during any war, or in any campaign or expedition (for which a campaign badge has been authorized), and have been separated therefrom under honorable conditions; * * *

* * * * *

SEC. 7. The names of preference eligibles shall be entered on the appropriate registers or lists of eligibles in accordance with their respective augmented ratings, and the name of a preference eligible shall be entered ahead of all others having the same rating: *Provided, That*, except for positions in the professional and scientific services for which the entrance salary is over \$3,000 per annum, the names of all qualified preference eligibles, entitled to ten points in addition to their earned ratings shall be placed at the top of the appropriate civil-service register or employment list, in ac-

cordance with their respective augmented ratings.

SEC. 8. When, in accordance with civil-service laws and rules, a nominating or appointing officer shall request certification of eligibles for appointment purposes, the Civil Service Commission shall certify, from the top of the appropriate register of eligibles, a number of names sufficient to permit the nominating or appointing officer to consider at least three names in connection with each vacancy. The nominating or appointing officer shall make selection for each vacancy from not more than the highest three names available for appointment on such certification, unless objection shall be made, and sustained by the Commission, to one or more of the persons certified, for any proper and adequate reason, as may be prescribed in the rules promulgated by the Civil Service Commission: *Provided*, That an appointing officer who passes over a veteran eligible and selects a nonveteran shall file with the Civil Service Commission his reasons in writing for so doing, which shall become a part of the record of such veteran eligible, and shall be made available upon request to the veteran or his designated representative; the Civil Service Commission is directed to determine the sufficiency or such submitted reasons and, if found insufficient, shall require such appointing officer to submit more detailed information in support thereof; the findings of the Civil Service Commission as to the sufficiency or insufficiency of such reasons shall be transmitted to and considered by such appointing officer, and a copy thereof shall be sent to the veteran eligible or to his designated representative

upon request therefor: *Provided, further,* That if, upon certification, reasons deemed sufficient by the Civil Service Commission for passing over his name shall three times have been given by an appointing officer, certification of his name for appointment may thereafter be discontinued, prior notice of which shall be sent to the veteran eligible. Whenever in the Postal Service two or more substitutes are appointed on the same day, they shall be promoted to the regular force in the order in which their names appeared on the civil-service register from which they were originally appointed, whenever there are substitutes of the required sex who are eligible and will accept, unless such vacancies are filled by transfer or reinstatement.

SEC. 9. In the unclassified Federal, and District of Columbia, civil service, and in all other positions and employment hereinbefore referred to in (c) of section 2 hereof, the nominating or appointing officer or employing official shall make selection from the qualified applicants in accordance with the provisions of this Act.

* * * * *

SEC. 11. The Civil Service Commission is hereby authorized to promulgate appropriate rules and regulations for the administration and enforcement of the provisions of this Act.

SEC. 12. In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings:

Provided, That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service: *Provided further*, That preference employees whose efficiency ratings are "good" or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below "good" shall be retained in preference to competing non-preference employees who have equal or lower efficiency ratings: *And provided further*, That when any or all of the functions of any agency are transferred to, or when any agency is replaced by, some other agency, or agencies, all preference employees in the function or functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replacing agency, or agencies, for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions.

SEC. 15. Any preference eligible, who has been furloughed, or separated without delinquency or misconduct, upon request, shall have his name placed on all appropriate civil-service registers and/or on all employment lists, for every position for which his qualifications have been established, as maintained by the Civil Service Commission, or as shall be maintained by any agency or project of the Federal Government, or of the District of Columbia, in the order as provided in section 7 hereof, and shall then be eligible for recertification and

reappointment in the order and according to the procedure as provided for in sections 7 and 8 hereof. No appointment shall be made from an examination register of eligibles, except of ten-point preference eligibles, when there are three or more names of preference eligibles on any appropriate reemployment list for the position to be filled.

B. REGULATIONS

The pertinent portions of the Civil Service Regulations, 5 CFR (1949) Parts 2, 20 and 21, provide:

PART 2—APPOINTMENT THROUGH THE COMPETITIVE SYSTEM

§ 2.107 *Eligible registers.* (a) The names of persons who qualify in competitive examinations shall be entered on appropriate registers in the order of their ratings, as may be augmented by veteran preference, subject to apportionment, residence, or other requirements of law or the Commission's regulations.

(b) When an eligible register has been established as the result of open competitive examination, the names of the following classes of persons may be entered thereon, provided they have a competitive status:

(1) Persons declared eligible by the Commission after appeal from separation under section 14 of the Veterans' Preference Act;

(2) Veterans who have been furloughed or separated without delinquency or misconduct, or who have resigned from the service, and applied for reentry of their names on such register.

Application for entrance on a register under this paragraph must be filed within 90 days of separation or failure of restoration or reemployment. Applicants shall be examined under the same standards used in the open competitive examination and their names shall be entered on the register in the order prescribed by paragraph (a) of this section.

(c) (1) Veterans who were in the armed forces of the United States subsequent to May 1, 1940, and for that reason lost eligibility on a register during a period that the register was used for probational appointment, shall have their names entered on the appropriate successor register if they:

(i) Have been honorably separated from the armed forces;

(ii) Are still qualified to perform the duties of the position for which the register is used; and

(iii) Make application for entrance on the register within 90 days after separation from active service or from hospitalization continuing after discharge for a period of not more than one year. Such persons shall be restored to the successor register, for the life of such register, in accordance with their former ratings as augmented by preference points, except as provided in subparagraph (2) of this paragraph.

(2) Persons who establish eligibility for entrance on a successor register in accordance with subparagraph (1) of this paragraph, shall have their names entered at the top of the appropriate group on the successor register if another person standing lower on the register on which their names formerly appeared was given a probational

appointment from such register. For the purpose of determining the appropriate group all 10-point veterans including such restored veterans, will be considered as one group, and all other eligibles including such restored 5-point veterans, as another group. However, for professional and scientific positions for which the basic entrance salary is over \$3,000 per annum, all eligibles will be considered as one group.

(3) Persons who meet the conditions for entrance on a successor register in accordance with subparagraphs (1) of this paragraph shall have their names listed for certification for probational appointment if no successor register exists and another person standing lower on the register on which their names formerly appeared was given a probational appointment from such register.

(4) A person having eligibility under subparagraphs (2) or (3) of this paragraph who, due to disability incurred because of military service in World War II, is unable to perform the duties of the position designated by him at the time of taking the examination for appointment thereto, may upon written request at any time have his name entered upon any list of eligibles for which a like examination is required and shall continue to have the rights granted by subparagraphs (2) or (3) of this paragraph.

* * * * *

PART 20—RETENTION PREFERENCE REGULATIONS FOR USE IN REDUCTIONS IN FORCE

* * * * *

§ 20.3 *Retention preference*—(a) *Classification*. For the purpose of determining

relative retention preference in reductions in force, employees shall be classified according to tenure of employment in competitive retention groups and subgroups as follows:

Group A: All employees currently serving under absolute or probational civil service appointments or, who were appointed, reappointed, transferred or promoted from absolute or probational civil service appointments to war service indefinite or trial period appointments without a break in service of 30 days or more. With respect to positions excepted from the Civil Service Act and rules, this includes all status and non-status employees currently serving in excepted positions under appointments without time limitation, or all employees who transferred from absolute or probational appointments in the competitive service to war service indefinite or trial period excepted appointments.

A-1 Plus during one-year period after return to duty, as required by law.

A-1 With veteran preference unless efficiency rating is less than "Good".

A-2 Without veteran preference unless efficiency rating is less than "Good".

A-3 With veteran preference where efficiency rating is less than "Good".

A-4 Without veteran preference where efficiency rating is less than "Good".

Group B: All employees serving in positions in the competitive service without competitive status or serving under appointments limited to the duration of the present war or for the duration of the war and not to exceed six months thereafter, or otherwise limited in time to a period in excess of one year, except those specifically covered in Groups A and C.

B-1 With veteran preference unless efficiency rating is less than "Good".

B-2 Without veteran preference unless efficiency rating is less than "Good".

B-3 With veteran preference where efficiency rating is less than "Good".

B-4 Without veteran preference where efficiency rating is less than "Good".

Group C: All employees in the competitive service serving under appointment with definite time limitations imposed in accordance with § 2.114 (c) of this chapter, or in accordance with specific authority of the Commission, all employees in the excepted service with definite time limitations of one year or less, all noncitizen employees serving within the continental limits of the United States, its territories or possessions, all employees continuing beyond the automatic retirement age, and all annuitants appointed under section 2 (b) of the Civil Service Retirement Act, as amended.

C-1 With veteran preference unless efficiency rating is less than "Good".

C-2 Without veteran preference unless efficiency rating is less than "Good".

C-3 With veteran preference where efficiency rating is less than "Good".

C-4 Without veteran preference where efficiency rating is less than "Good".

§ 20.8 *Sequence of selection.* Within each competitive level; action must be taken to eliminate all employees in lower subgroups before a higher subgroup is reached, and within each subgroup of retention groups A and B action must be taken concerning all employees with a lower number of retention credits before an employee

with a higher number of retention credits is reached, except as provided below. Action may be taken at administrative discretion within any subgroup of retention group C. Whenever two or more employees are tied for position in retention group A or B, the ties shall be broken first by considering half years of service in excess of total years for which retention credits were granted, and then by giving consideration to such matters as official conduct, or established administrative policy.

* * * * *

**PART 21—APPOINTMENT TO POSITIONS
EXCEPTED FROM THE COMPETITIVE
SERVICE**

§ 21.1° *Extent of regulations*—(a) *Positions covered.* The regulations in this part shall apply to all positions (1) in the executive branch of the Federal Government that are excepted from the competitive service; (2) in any temporary or emergency establishment, agency, bureau, administration, project, and department created by acts of Congress or Presidential Executive order which are excepted from the provisions of the Civil Service Act of January 16, 1883; and (3) in the civil service of the District of Columbia. Positions excepted from the competitive service include all positions excepted from the provisions of the Civil Service Act of January 16, 1883, by statute or Executive order, including positions listed in Part 6 of this chapter, positions which may be filled by persons under personal service contract, and positions in Government owned or controlled corpora-

tions. The civil service of the District of Columbia includes all positions in the Government of the District of Columbia, and positions under the Board of Education and the Board of Library Trustees of the District of Columbia.

(b) *Applicability.* The provisions of the regulations in this part respecting the examination, rating, and selection for appointment of applicants are required to be followed whenever a qualified person entitled to preference under § 21.2 applies for consideration for appointment. Such provisions may be followed, in the discretion of the agency, in making appointments when no preference applicant applies.

§ 21.2 *Persons entitled to military preference.* In actions taken under the regulations in this part, five-point military preference or ten-point military preference as specified in section 3 of the Veterans' Preference Act of 1944 shall be granted to those persons specified in section 2 of that act. Separation under honorable conditions, as used therein, shall mean any separation from active duty in any branch of the armed forces under honorable conditions. A transfer to inactive status, a transfer to retired status, the acceptance of a resignation, or the issuance of a discharge will be considered as covered by the above definition if such separation was under honorable conditions.

§ 21.3 *Receipt of applications; uniform treatment.* Each agency shall establish definite rules regarding the acceptance of applications for employment in positions covered by the regulations in this part. Such rules shall be made of record in the agency and shall be uniformly applied to

all persons who meet the conditions of such rules. Information regarding the rules shall be furnished upon request.

§ 21.5 *Examination of applicants—(a) Rating.* The agency may provide for an evaluation of the qualifications of all applicants for a position, who are available under §§ 21.3 and 21.4 at any time prior to appointment being made to such position. Numerical ratings shall be assigned on a scale of 100 and all applicants rated 70 or more shall be eligible for appointment: *Provided*, That no numerical ratings need be assigned whenever all qualified applicants will be offered immediate appointment: *Provided further*, That whenever there is an excessive number of applicants, only a sufficient number of the highest qualified applicants to meet the anticipated needs of the agency within a reasonable length of time need be given numerical ratings; in such cases the agency shall adopt procedures which will insure consideration of all preference applicants in the order in which they would have been considered if all applicants had been assigned numerical ratings. To the earned numerical ratings of applicants entitled to five-point preference, five points shall be added and to the earned numerical ratings of applicants entitled to ten-point preference, ten points shall be added. A notice of the rating assigned shall be furnished upon request.

No consideration shall be given the application of any non-preference applicant, nor shall such application be rated, for the positions of elevator operator, messenger, guard and custodian as long as qualified

applicants entitled to preference are available for such position.

Whenever experience is a factor in determining eligibility, an applicant entitled to five-point or ten-point preference under the regulations in this part shall be credited with time spent in the military or naval service of the United States when the position for which he is applying is similar to that he held immediately prior to his entrance into the military or naval service; credit shall also be given such applicant for all valuable experience, including experience gained in religious, civic, welfare, service, and organizational activities, regardless of whether any compensation was received therefor.

§ 21.6 *Maintenance of employment lists*—(a) *Establishment of lists.* All applicants assigned eligible numerical ratings in accordance with § 21.5 shall have their names entered on either (1) the appropriate reemployment list or (2)* the appropriate regular employment list. The names of all such applicants shall be entered on said lists in accordance with their ratings, except that the names of applicants entitled to five- or ten-point preference under the regulations in this part shall be entered on such lists in accordance with their respective augmented ratings, and the name of a preference applicant shall be entered ahead of all others having the same rating: *Provided*, That except on lists of applicants for professional and scientific positions for which the basic entrance salary is over \$3,000 per annum, the names of applicants entitled to ten-point preference under the regulations in this part shall be placed at the top of the appropriate lists.

(b) *Reemployment list.* The reemployment list will consist of the names of former employees of the agency who are to be considered for future employment, and shall, in any case, include the following:

(1) The names of former employees of the agency entitled to preference under the regulations in this part who have been furloughed or separated without delinquency or misconduct and who apply for reemployment.

(2) The names of any former employees of the agency entitled to preference under the regulations in this part who are found by the Commission, in accordance with § 21.10, to have been unjustifiably dismissed from the agency.

(c) *Regular employment list.* Eligible applicants assigned numerical ratings who are not entered on the agency reemployment list shall be entered on the regular employment list.

(d) *Order of consideration.* (1) The names of all applicants who are assigned eligible numerical ratings for a given position shall, except as provided below for professional and scientific positions for which the basic entrance salary is over \$3,000 per annum, be considered either in Order A or in Order B, below:

(i) Order A: (a) The names of qualified applicants entitled to ten-point preference under the regulations in this part whose names appear on the agency reemployment list, in the order of their numerical ratings.

(b) The names of all other qualified applicants entitled to ten-point preference under the regulations in this part in the order of their numerical ratings.

(c) The names of all other qualified applicants on the agency's reemployment lists in the order of their numerical ratings.

(d) The names of all other qualified applicants in the order of their numerical ratings.

(ii) Order B: (a) The names of qualified applicants entitled to ten-point preference under the regulations in this part whose names appear on the agency reemployment list, in the order of their numerical ratings.

(b) The names of all other qualified applicants on the agency's reemployment list, in the order of their numerical ratings.

(c) The names of all other qualified applicants entitled to ten-point preference under the regulations in this part in the order of their numerical ratings.

(d) The names of all other qualified applicants, in the order of their numerical ratings.

(2) The names of all applicants assigned numerical eligible ratings for professional and scientific positions for which the basic entrance salary is over \$3,000 per annum shall be considered in the following order:

(i) The names of applicants on the agency's reemployment list, in the order of their numerical ratings.

(ii) The names of all other applicants, in the order of their numerical ratings.

§ 21.7 *Selection and appointment*—(a) *Selection.* In making appointments from employment lists the agency shall make selection for appointment to each vacancy from not more than the highest three names available for appointment in the order provided in § 21.6 (d): *Provided,*

That the agency need not accord eligibles on the agency reemployment list the preferential consideration provided in that section for such eligibles if such list contains the names of less than three applicants entitled to preference under the regulations in this part; *Provided further*, That the agency need not consider any applicant who has previously been considered three times, nor any preference applicant who has been disqualified under the provisions of paragraph (b) of this section. The second and any additional vacancies shall be filled in like manner.

(b) *Passing over a preference applicant.* Whenever an agency in making a selection of a nonpreference applicant in accordance with paragraph (a) of this section passes over the name of a preference applicant who, under § 21.6 (d), is entitled to prior consideration, it shall record its reasons for so doing. A copy of such reasons shall, upon request, be sent to the preference applicant or his designated representative.

When, in making appointments to a position, an agency has on three occasions passed over the name of a preference applicant and recorded its reasons for so doing, consideration of his name for such position may thereafter be discontinued.